Uni Wall Architectural Products & Services Sdn Bhd v Global Upline Sdn Bhd (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D22–1531 OF 2009
AMELIA TEE ABDULLAH JC
30 NOVEMBER 2010

Civil Procedure — Jurisdiction — Forum conveniens — Whether correct and proper forum was Kuching High Court — Whether four subparagraphs of s 23(1) of the Courts of Judicature Act 1964 were to be read disjunctively — Whether writ should be struck off for want of jurisdiction

Civil Procedure — Striking out — Application for — Whether writ was defective for its non-compliance with O 12 r 7 of the Rules of the High Court 1980 — Whether non-compliance was irregularity that was incurable — Whether defendant suffered prejudice because of non-compliance — Whether writ should be struck off for want of jurisdiction — Rules of the High Court 1980 O 1A, O 2 r 3 & O 12 r 7

When a bank cheque for a sum of RM1.5m issued by the defendant, a company in Kuching, Sarawak, to the plaintiff was dishonoured when presented for payment, the plaintiff commenced an action in the High Court of Kuala Lumpur against the defendant. The writ of summons and statement of claim served by the plaintiff on the defendant gave the latter eight days from the date of service of the writ to enter an appearance. The defendant then applied for and obtained leave on 20 November 2009 to enter conditional appearance. Thereafter the defendant filed an ex parte application for extension of time until 29 January 2010 to file an application to set aside the plaintiff's writ. The application was granted on 15 December 2009 and the defendant filed its application to set aside the plaintiff's writ and statement of claim ('the defendant's application') on 29 January 2010. On 25 February 2010, the plaintiff filed an application to set aside the order dated 15 December 2009 as well as the defendant's application to set aside the writ ('the plaintiff's application'). At the suggestion of the court it was agreed by both parties that both the applications would be heard together. In its striking out application the defendant raised two grounds, namely, that the writ was defective for its non-compliance with O 12 r 7 of the Rules of the High Court 1980 ('RHC'), and that the forum conveniens for this case was Kuching, Sarawak. The defendant submitted that since the writ was issued by the Kuala Lumpur High Court and intended for service in Sarawak, the defendant should have been given a period of 12 days to enter an appearance, as provided under O 12 r 4 of

the RHC. It was also the defendant's case that since the subject matter of the case, the construction of a 12-storey hotel, was in Kuching, Sarawak and the breach of contract accrued in Kuching and the cheque in question was issued by the bank in Kuching the correct and proper forum for the matter was the Kuching High Court. In response the plaintiff conceded that there was a failure to comply with O 12 r 4 of the RHC but that the non-compliance was not fatal or incurable but only an irregularity that could be cured under O 1A and/or O 2 of the RHC. The plaintiff further submitted that the inadvertent clerical mistake had not caused any prejudice to the defendant. As for the proper forum for this case the plaintiff submitted that as the cause of action accrued immediately upon the cheque being dishonoured for payment in Peninsular Malaysia the High Court in Kuala Lumpur had jurisdiction. The plaintiff relied on s 23(1) of the Courts of Judicature Act 1964 ('CJA') and contended that even though the High Court of Kuching also had jurisdiction to try this case, it did not warrant striking out this action for want of jurisdiction. As to the plaintiff's application, the defendant raised the preliminary objection that the order granting the defendant an extension of time to file its application to set aside the writ and a stay until this application was heard was not an appealable decision. The defendant submitted that this decision, which did not dispose of the rights of the parties, was not a decision within s 3 of the CJA but a procedural ruling. The plaintiff however, submitted that the defendant's preliminary objection should be dismissed because the said decision was not excluded by s 3 of the CJA and was appealable.

Held, dismissing the defendant's application with costs and making no order as to the plaintiff's application:

(1) On the facts of the instant case the plaintiff's error in giving the defendant eight days to enter an appearance was a clerical mistake that was made unintentionally. It was noted that the defendant itself was in error by stating in its written submission that it had 12 days when the time for entering an entering an appearance in this case should, under O 12 r 4(b) of the RHC, have clearly been 20 days. After taking into consideration all the relevant issues and the justice of the case, it was found that the plaintiff's non-compliance with O 12 r 4 of the RHC, thereby giving the defendant only eight days to enter an appearance did not occasion a miscarriage of justice. As no adverse order was made against the defendant during this eight day period and the non-compliance was but an irregularity that was curable under O 2 r 3 of the RHC, to require the plaintiff to re-file his writ would have further caused a further delay in resolving the dispute between the parties and would run counter to the dictates of O 1A of the RHC (see paras 44 & 46).

(2) On the issue of *forum non conveniens* the court was satisfied that the four subparas of s 23(1) of the CJA were to be read disjunctively. The

defendant had sought to argue that since the subject matter of the case was in Kuching and the breach of contract accrued in Kuching the proper forum for this case was Kuching, but the plaintiff's claim in this case was not in respect of these matters but premised on the dishonouring of a cheque issued by the defendant. Thus although the High Court of Kuching also had jurisdiction by virtue of the fact that the defendant had its place of business in Sarawak, this fact did not allow the defendant to apply to strike out the writ for want of jurisdiction (see paras 47–48).

(3) With the defendant's application being disposed of the plaintiff's appeal became academic. As such, no order was made in respect of the plaintiff's application (see para 50).

[Bahasa Malaysia summary

Apabila cek bank berjumlah RM1.5 juta yang dikeluarkan oleh defendan, sebuah syarikat di Kuching, Sarawak kepada plaintif, menjadi tidak laku apabila ia dikemukakan untuk pembayaran, plaintif telah memulakan tindakan di Mahkamah Tinggi Kuala Lumpur terhadap defendan. Saman writ dan pernyataan tuntutan yang disampaikan oleh plaintif kepada defendan memberikan defendan lapan hari dari tarikh penyampaian writ tersebut untuk memasukkan kehadiran. Defendan kemudiannya memohon dan mendapat kebenaran pada 20 November 2009 untuk memasukkan kehadiran bersyarat. Selanjutnya, defendan telah memfailkan permohonan ex parte untuk lanjutan masa sehingga 29 Januari 2010 untuk memfailkan permohonan mengetepikan writ plaintif. Permohonan telah diberikan pada 15 Disember 2009 dan defendan telah memfailkan permohonannya untuk mengetepikan writ dan pernyataan tuntutan plaintif ('permohonan defendan') pada 29 Januari 2010. Pada 25 Februari 2010, plaintif telah memfailkan permohonan mengetepikan perintah bertarikh 15 Disember 2009 dan juga permohonan defendan untuk mengetepikan writ tersebut ('permohonan plaintif'). Berdasarkan cadangan oleh mahkamah, adalah dipersetujui oleh kedua-dua pihak bahawa kedua-dua permohonan seharusnya didengar bersama. Di dalam permohonan untuk pembatalannya, defendan telah membangkitkan dua alasan, iaitu, bahawa writ tersebut adalah cacat disebabkan ketidakpatuhan A 12 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan bahawa forum conveniens bagi kes ini adalah Kuching, Sarawak. Defendan berhujah bahawa memandangkan writ tersebut telah dikeluarkan oleh Mahkamah Tinggi Kuala Lumpur dan bertujuan untuk penyampaian di Sarawak, defendan seharusnya diberikan tempoh 12 hari untuk memasukkan kehadiran, seperti yang diperuntukkan di bawah A 12 k 4 KMT. Adalah menjadi kes defendan juga bahawa memandangkan perkara subjek kes ini, pembinaan hotel 12 tingkat, adalah di Kuching, Sarawak dan pelanggaran kontrak terakru di Kuching dan cek yang dipersoalkan telah dikeluarkan oleh bank di Kuching, perantaraan yang betul dan sesuai bagi perkara ini ialah Mahkamah Tinggi Kuching. Sebagai balasan, plaintif bersetuju bahawa terdapat kegagalan untuk mematuhi A 12 k 4 KMT

tetapi ketidakpatuhan tersebut bukanlah memudaratkan atau tidak boleh diperbaiki tetapi hanyalah luar aturan yang boleh diperbetulkan di bawah A 1A dan/atau A 2 KMT. Plaintif selanjutnya berhujah bahawa kesilapan perkeranian yang tidak disengajakan tersebut tidak menyebabkan sebarang prejudis kepada defendan. Bagi perantaraan yang sesuai bagi kes ini, plaintif berhujah bahawa memandangkan kausa tindakan terakru sejurus selepas cek tersebut menjadi tidak laku untuk pembayaran di Semenanjung Malaysia, Mahkamah Tinggi di Kuala Lumpur mempunyai bidang kuasa. Plaintif bergantung kepada s 23(1) Akta Mahkamah Kehakiman 1964 ('AMK') dan berhujah bahawa meskipun Mahkamah Tinggi Kuching juga mempunyai bidang kuasa untuk mendengar kes ini, ia tidak mewajarkan pembatalan tindakan ini disebabkan ketiadaan bidang kuasa. Bagi permohonan plaintif, defendan membangkitkan bantahan awal bahawa perintah yang memberikan defendan lanjutan masa untuk memfailkan permohonan untuk mengetepikan writ dan penggantungan sehingga permohonan tersebut didengar bukanlah keputusan yang boleh dirayu. Defendan berhujah bahawa keputusan ini, yang mana tidak memutuskan hak-hak pihak, bukanlah keputusan yang termasuk di dalam s 3 AMK akan tetapi adalah keputusan prosedur. Plaintif walau bagaimanapun, berhujah bahawa bantahan awal defendan seharusnya ditolak oleh kerana keputusan tersebut tidak dikecualikan oleh s 3 AMK dan boleh dirayu.

Diputuskan, menolak permohonan defendan dengan kos dan tiada perintah terhadap permohonan plaintif:

(1) Berdasarkan fakta-fakta kes ini, kesilapan plaintif memberikan defendan lapan hari untuk memasukkan kehadiran adalah kesilapan perkeranian yang tidak disengajakan. Adalah ditekankan bahawa defendan sendiri telah silap dengan menyatakan di dalam hujahan bertulisnya bahawa ia mempunyai 12 hari sedangkan tempoh untuk memasukkan kehadiran di dalam kes ini, di bawah A 12 k 4(b) AMK, dengan jelas adalah 20 hari. Setelah mengambil kira kesemua isu yang relevan dan keadilan kes ini, adalah didapati bahawa ketidakpatuhan plaintif dengan A 12 k 4 AMK yang mana memberikan defendan hanya lapan hari untuk memasukkan kehadiran tidak menyebabkan salah laksana keadilan. Memandangkan tidak terdapat perintah bertentangan yang dibuat terhadap defendan semasa tempoh lapan hari ini dan ketidakpatuhan tersebut adalah luar aturan yang boleh diperbetulkan di bawah A 2 k 3 KMT, dengan memerlukan plaintif untuk memfailkan semula writnya akan selanjutnya menyebabkan kelewatan dalam menyelesaikan pertikaian di antara pihak-pihak dan bertentangan dengan apa yang ditetapkan oleh A 1A KMT (lihat perenggan 44 & 46).

(2) Mengenai isu *forum non conveniens*, mahkamah berpuas hati bahawa keempat-empat subperenggan AMK hendaklah dibaca secara berasingan. Defendan telah berhujah bahawa memandangkan perkara

subjek kes adalah di Kuching dan pelanggaran kontrak terakru di Kuching, perantaraan yang bersesuaian bagi kes ini adalah Kuching, tetapi tuntutan plaintif di dalam kes tiada kaitan dengan perkara-perkara ini tetapi berpremiskan cek tidak laku yang dikeluarkan oleh defendan. Oleh itu, meskipun Mahkamah Tinggi Kuching juga mempunyai bidang kuasa berikutan fakta bahawa defendan mempunyai tempat perniagaan di Kuching, fakta ini tidak membenarkan defendan untuk memohon untuk menolak writ disebabkan ketiadaan bidang kuasa (lihat perenggan 47–48).

(3) Dengan permohonan defendan yang telah diputuskan, rayuan plaintif menjadi akademik. Oleh itu, tiada sebarang perintah dibuat berkenaan dengan permohonan plaintif (lihat perenggan 50).]

Notes

For cases on application for striking out, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7478–7481.

For cases on *forum conveniens*, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4917–4931.

Cases referred to

Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh [2005] MLJU 254; [2005] 7 CLJ 1, HC (refd)

Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd [2003] 5 MLJ 40, HC (refd)

Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd [1990] 1 MLJ 191, HC (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (distd)

Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd [2006] 4 MLJ 271; [2006] 2 CLJ 1021, CA (folld)

Eon Bank Berhad v Cepad Group Sdn Bhd & Ors [2004] MLJU 445; [2004] 1 LNS 377, HC (refd)

Kenichi Hattori & Anor v Minoru Yamashita & Anor [2003] MLJU 608; [2004] 1 CLJ 491, HC (folld)

MBT (Malaysia) Sdn Bhd v Asawira Sdn Bhd [2004] 1 CLJ 661, HC (refd)

Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112, HC (refd)

Metroinvest Anstalt and others v Commercial Union Assurance Co plc [1985] 2 All ER 318, CA (refd)

Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors [2010] 2 MLJ 661; [2010] 3 CLJ 924, CA (refd)

OCBC Bank (M) Bhd v Astano Electric Sdn Bhd [1999] 3 MLJ 618, HC (refd)

Pakata Sdn Bhd v Chean Seong Fatt & Ors [2001] 6 CLJ 318, HC (refd)

Perak Hanjoong Simen Sdn Bhd v Perindustrian Tenaga Mix Sdn Bhd [2008] 8 MLJ 567; [2008] 6 CLJ 652, HC (refd)
Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v Public Prosecutor [1985] 2 MLJ 436, SC (refd)
Shorga Sdn Bhd v Amanah Raya Bhd (as administrator of the estate of Raja Nong Chik bin Raja Ishak, deceased) [2004] 1 MLJ 143; [2004] 1 CLJ 417, HC (refd)
Sogelease Advance (Malaysia) Sdn Bhd v Kemajuan Tat Young Sdn Bhd & Ors [1999] 5 CLJ 331, HC (refd)
Spiliada Maritime Corp v Cansulex Ltd; The Spiliada [1986] 3 All ER 843, HL (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)
Tan Poey Kheng v Ma Peng Kiat [1984] 1 MLJ 58, HC (refd)
Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)
Yap Siew Tiong v Matsushita Industrial Corporation Sdn Bhd [2003] MLJU 425; [2003] 7 CLJ 266, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 23(1), 23(1)(a), (b), (c), (d)
Rules of the High Court 1980 O 1A, O 2 rr 1, 1(2), 2, 3, O 6 rr 2(1)(b), 7(2), (2A), O 12 rr 4, 4(b), 7, O 14, O 32 r 6, Form 2

CJ Siew (KY Lee with him) (Douglas Yee) for the plaintiff.
Muhammad Shafee Abdullah (R Vasanthi with him) (Shafee & Co) for the defendant.

Amelia Tee Abdullah JC:

DECISION ON ENCLS 13 AND 21

[1] The plaintiff, Uni Wall Architectural Products & Services Sdn Bhd has claimed against the defendant, Global Upline Sdn Bhd (M) Sdn Bhd, for a sum of RM1,500,000 being the amount on a Bank Muamalat cheque given by the defendant that was dishonored when presented for payment at HSBC, the plaintiff's bank.

[2] Two enclosures have been fixed for hearing in this case. Enclosure 13 is the defendant's application to set aside the writ of summons and statement of claim dated 29 January 2010. Enclosure 21 is the plaintiff's notice of appeal to the judge in chambers against the decision of the senior assistant registrar ('SAR') in allowing the plaintiff's preliminary objection and ordering that the hearing of encl 17 be stayed pending the disposal of encl 13.

[3] Learned counsel for the plaintiff submitted that encl 21 should be heard first whereas counsel for the defendant contended that encl 13 should be heard first. At the suggestion of the court, it was agreed by both parties that both enclosures would be heard together.

CHRONOLOGY OF EVENTS

[4] The plaintiff filed his writ of summons and statement of claim on 6 August 2009. The writ and statement of claim which were served on the defendant at Nos 122 & 123 RH Plaza, Jalan Lapangan Terbang, 93350 Kuching, Sarawak on 2 November 2009 gave the defendant eight days from the date of service of the writ to enter appearance.

[5] The defendant applied ex parte for leave to enter conditional appearance. Leave was granted on 20 November 2009. The defendant was to apply to set aside the writ within 30 days of the date of the order which meant that the application to set aside the writ was to have been made on or before 19 December 2009.

[6] The defendant next filed an ex parte application for extension of time until 29 January 2010 to file the application to set aside the writ (encl 8). Other prayers sought was an order to stay all proceedings until the defendant's application to strike out the writ was determined and an order for the costs of the application to be borne by the plaintiff. The application was granted on 1 December 2009.

[7] In the meantime the plaintiff, not having been served with the defendant's two preceding applications, filed an application on 6 January 2010 for summary judgment under O 14 of the RHC (encl 10).

[8] On 29 January 2010, the defendant finally filed its application to set aside the writ of summons to set aside the writ (encl 13).

[9] On 25 February 2010, the plaintiff filed an application (encl 17) to set aside the order dated 15 December 2009 as well as to strike off the summons in chambers dated 29 January 2010. At the hearing of encl 17 fixed on 17 August 2010, the defendant raised a preliminary objection to the effect that the hearing of encl 17 cannot be proceeded with as there was a stay of proceedings in place and therefore encl 13 must be disposed of first before encl 17. The learned SAR allowed the defendant's preliminary objection and ordered that encl 17 be stayed pending the disposal of encl 13.

ENCLOSURE 13: THE DEFENDANT'S APPLICATION TO SET ASIDE THE WRIT OF SUMMONS AND STATEMENT OF CLAIM

The defendant's position

[10] Enclosure 13 is the defendant's application to set aside the writ of summons and statement of claim. The defendant relies on O 12 r 7 of the RHC and raises two main grounds, namely:

(a) defective writ of summons; and

(b) forum non conveniens.

Defective writ of summons

[11] The defendant contends that the plaintiff had filed the writ of summons at the registry of the High Court in Kuala Lumpur and the same was served on the defendant at Nos 122 & 123 RH Plaza, Jalan Lapangan Terbang, 93350 Kuching Sarawak. However, the endorsement on the writ for the defendant to enter appearance was eight days upon service of the writ and not 12 days. This is contrary to the provisions of O 12 r 4 of the RHC and therefore the writ should be set aside as it was defective as to the time to enter appearance.

[12] The defendant submits that since the writ was issued by the Kuala Lumpur High Court and intended for service in Sarawak, the defendant should have been given a period of 12 days in accordance with O 12 r 4 of the RHC. Reference was made to the cases of *OCBC Bank (M) Bhd v Astano Electric Sdn Bhd* [1999] 3 MLJ 618 and *Yap Siew Tiong v Matsushita Industrial Corporation Sdn Bhd* [2003] MLJU 425; [2003] 7 CLJ 266 in connection with the local jurisdiction of the court.

[13] The defendant submits that although the plaintiff had contended that such an error is merely an inadvertent clerical mistake, had not caused any prejudice to the defendant because it was allowed to enter conditional appearance and that such irregularity was curable, it cannot be assumed that such an error did not prejudice the defendant just because it was able to enter conditional appearance. The defendant contends that it must not be deprived of its right to have 12 days to properly scrutinise documents.

[14] The defendant further submits that in connection with non-compliance with the rules, the curing provision should not be wantonly utilised and cites the case of *MBT (Malaysia) Sdn Bhd v Asawira Sdn Bhd* [2004] 1 CLJ 661 where the High Court declined to invoke O 2 r 1 of the

RHC because it said that there was 'a blatant non-compliance with the very basic and fundamental rules of the court'.

[15] The defendant has also drawn the court's attention to the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329 where the Federal Court held that a general provision such as O 1A of the RHC must not supersede a mandatory requirement of the Rules. The court went on to say that O 1A cannot be invoked when a party intentionally disregards in complying with the Rules. The court held that since the respondents had intentionally disregarded O 6 r 7(2A) for their own reasons, O 1A of the RHC did not apply.

[16] As such, the defendant submits that the plaintiff cannot assume that they are relieved from the duty to comply with the RHC just because no prejudice was caused to the defendant when they were able to enter appearance in time despite the defective writ.

Forum non conveniens

[17] The defendant takes the position that the correct and proper forum for this matter is the Kuching High Court and not the Kuala Lumpur High Court based on the following reasons:

(a) the plaintiff's registered and business addresses are in Kuching, Sarawak;

(b) this action is in respect of the construction of a 12 storey hotel on Lots 3186, 3187 and 7143 Blok 16 KCLD, Kuching, Sarawak;

(c) the breach of contract accrued in Sarawak when the plaintiff failed to remedy the defects to the building;

(d) the cheque in question was issued by Bank Muamalat in Kuching, Sarawak; and

(e) all correspondences in relation to this matter were addressed to the defendant in Kuching, Sarawak.

[18] The defendant disputes the plaintiff's contention that the defendant's difficulty in travelling back and forth to attend the matter in Kuala Lumpur is not a relevant consideration. Reliance was placed by the defendant on the case of *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 where the High Court held that since the defendant/respondent was residing in Kuching and the witnesses being there, Kuching would be more convenient considered from the point of view of convenience.

[19] Learned counsel for the defendant submits that this court should decline to exercise jurisdiction on the ground that this case must be heard by a more accessible court. It was pointed out that the subject matter of the case is a project in Kuching, Sarawak and all documents and witnesses pertaining to the action are in Kuching, Sarawak. Based on the aforestated cases and other authorities such as *Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd* [2003] 5 MLJ 40; *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 and *Spiliada Maritime Corp v Cansulex Ltd; The Spiliada* [1986] 3 All ER 843, the defendant contends that the forum conveniens is in Kuching, Sarawak.

THE PLAINTIFF'S POSITION

[20] The plaintiff concedes that pursuant to O 12 r 4 of the RHC, the defendant has a period of 20 days to enter appearance. The error, he submits, was a clerical mistake that was made unintentionally.

[21] The plaintiff submits that the defendant has not positively asserted that they had suffered prejudice. It contends that no prejudice has been caused to the defendant by virtue of the non-compliance. No judgment in default of appearance was entered on the basis of the period of eight days as stated in the writ of summons. As such, the non-compliance is not fatal and incurable per se but only an irregularity that can be cured under O 1A and/or O 2 rr 1 and 2 of the RHC.

[22] The plaintiff relied on the case of *Pakata Sdn Bhd v Chean Seong Fatt & Ors* [2001] 6 CLJ 318 where the first defendant had sought to have the writ and subsequent proceedings set aside on the grounds that the writ should have been a 12 day writ instead of an 8 day writ. There His Lordship Arifin Zakaria J (as His Lordship then was), guided by English Court of Appeal in the case of *Metroinvest Anstalt and others v Commercial Union Assurance Co plc* [1985] 2 All ER 318, held that as the first defendant was not at all prejudiced by the irregularity in the writ, there would be no injustice if the court were to order that the irregularity be cured under O 2 r 1(2).

[23] Reference was also made to the case of *Bank Simpanan Nasional v Abdul Mutalib Mohd Salleh* [2005] MLJU 254; [2005] 7 CLJ 1 where the defendant had raised a preliminary objection on the ground that the time limited for appearing should be 12 instead of eight days. There His Lordship Low Hop Bing referred to O 1A and O 2 r 3 and held that there was no merit in the defendant's preliminary objection because the non-compliance had not occasioned a substantial miscarriage of justice.

[24] On the issue of jurisdiction, it is the plaintiff's contention that their claim is based on the fact that a Bank Muamalat Malaysia Bhd cheque No

307279 issued by the defendant to the plaintiff had been dishonored for payment upon presentation to the HSBC Bank in Peninsular Malaysia. The plaintiff submits that the cause of action accrued immediately upon the cheque being dishonored for payment and thus the High Court of Malaya has jurisdiction.

[25] The plaintiff relies on the cases of *Sogelease Advance (Malaysia) Sdn Bhd v Kemajuan Tat Young Sdn Bhd & Ors* [1999] 5 CLJ 331 and *Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarine Sdn Bhd* [2006] 4 MLJ 271; [2006] 2 CLJ 1021 in support of their argument that subparas (a), (b), (c) and (d) of s 23(1) of the Courts of Judicature Act 1964 must be viewed at disjunctively. As such, the plaintiff submits that even though the High Court of Sarawak also has jurisdiction to try this case, it does not warrant the striking out of this action for want of jurisdiction.

ENCLOSURE 21: THE PLAINTIFF'S APPEAL AGAINST THE DECISION OF THE SAR ALLOWING THE DEFENDANT'S PRELIMINARY OBJECTION

The defendant's position

[26] The defendant has raised a preliminary objection that the decision of the learned SAR is not an appealable decision. The defendant submits that whilst the decision of the SAR is a ruling made in the course of a trial or hearing of a cause or matter, it does not dispose of the rights of the parties. Learned counsel for the defendant pointed out that the substantive matter is still there. As such, the decision of the SAR does not fall within the definition of 'decision' in s 3 of the Courts of Judicature Act 1964 as here is no finality in the said order which did not dispose of the rights of the parties.

[27] The defendant submits that such a decision of the SAR is but a procedural ruling and there is thus no avenue of appeal. Reliance is placed on the case of *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 where the appellants had appealed against the ruling of the learned judge that he dispose of encl 27 (the substantive notice of motion) before dealing with encl 21 (the appellant's application to set aside the injunction). The Supreme Court observed that this was clearly an appeal against a mere procedural ruling and that 'the Court has always discouraged such appeals as they stand in the way of a speedy disposal of substantive trials and delay an expeditious result of the main proceedings'.

[28] In its submissions, the defendant has also cited a number of other authorities. In the case of *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v Public Prosecutor* [1985] 2 MLJ 436, the Supreme Court

held that the word 'order' preceded by the words 'judgment' and 'sentence' means that the order must be a final order in the sense that it is final in its effect as in the case of a judgment or sentence. In the case of *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495, the Court of Appeal held that any ruling made in the course of a trial or hearing of any cause or matter which do not finally dispose of the rights of the parties do not constitute a decision for the purpose of s 3 of the Courts of Judicature Act 1964. However, the plaintiff has attempted to distinguish these two authorities which do not deal with preliminary objections but with admissibility of documents during a trial.

The plaintiff's position

[29] The plaintiff submits that the defendant's preliminary objection should be dismissed because the decision of the SAR is appealable. The plaintiff cites the cases of *Eon Bank Berhad v Cepad Group Sdn Bhd & Ors* [2004] MLJU 445; [2004] 1 LNS 377, *Shorga Sdn Bhd v Amanah Raya Bhd (as administrator of the estate of Raja Nong Chik bin Raja Ishak, deceased)* [2004] 1 MLJ 143; [2004] 1 CLJ 417 and *Perak Hanjoong Simen Sdn Bhd v Perindustrian Tenaga Mix Sdn Bhd* [2008] 8 MLJ 567; [2008] 6 CLJ 652 in support of its contention. It is argued that the right of appeal against the decision of the SAR has not been excluded by s 3 of the Courts of Judicature Act 1964. In *Perak Hanjoong Simen*, the plaintiff had raised a preliminary objection against Messrs Tee & Partners from representing the defendant on grounds of conflict of interest. The defendant appealed against the decision of the SAR who allowed the plaintiffs preliminary objection. The plaintiff raised a preliminary issue, ie that the decision of the SAR was not appealable as it did not constitute a decision that could be appealed from as stipulated under s 3 of the Courts of Judicature Act 1964.

[30] In dismissing the appeal, Rohana Yusuf J held as follows:

> ... under O 56 r 1 of the Rules of the High Court 1980 (RHC), 'an appeal shall lie to a judge in chambers from any judgment, order or decision of the registrar'. As submitted by Encik Tee, the decision of the SAR is appealable because under O 56 r 1 of the RHC an appeal can be made to a judge in chambers from any judgment, order or decision. The terms 'judgment, order or decision' are not qualified to only decisions that can dispose of the rights of parties. In fact they are not qualified in any way. Thus, it is clear that the decision of the SAR herein is therefore appealable under the said O 56 r 1 of the RHC. Furthermore, an appeal to a judge in chambers is a rehearing and is treated as though it comes before the court for the first time as decided by the Federal Court case of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241'.

[31] Re the merits of the appeal, the plaintiff submits that the court can set aside an order that was made ex parte. Reference was made to the case of *Tan Poey Kheng v Ma Peng Kiat* [1984] 1 MLJ 58 where Mohamed Dzaiddin J (as His Lordship was then) held that O 32 r 6 of the RHC provides that the court may set aside an order made ex parte and that this rule embodies the fundamental rule of practice that a party affected by an ex parte order may apply to the court to discharge it, inasmuch as he has not had an opportunity of being heard. In the more recent case of *Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors* [2010] 2 MLJ 661; [2010] 3 CLJ 924, the Court of Appeal said that O 32 r 6 of the RHC is a good piece of legislation 'because it protects the basic right of the litigants in that the party who has not been heard may apply may apply to the court to have that order discharged forthwith'.

[32] The plaintiff submits that to allow the SAR's decision to stand will cause grave injustice to the plaintiff. Although the plaintiff had applied to set aside the ex parte order vide encl 17, the SAR's decision to stay the hearing of encl 17 pending the disposal of encl 13 had rendered encl 17 nugatory and meaningless. This is especially so when the ex parte order, which includes a stay of all proceedings, was made on an ex parte basis without giving an opportunity to the plaintiff to oppose the same.

DECISION

[33] In respect of encl 13, the court notes that the endorsement on the impugned writ for the defendant to enter appearance was eight days. Notwithstanding the defendant's submission that the time limited for entering appearance is 12 days, the court finds that it clear from a reading of O 12 r 4(b) that the time for entering appearance in this case should be 20 days as the writ was to be served in Sarawak from a writ issued in Kuala Lumpur.

[34] Having established that the time endorsed for the defendant to enter appearance is wrong, the next question for determination is this: what is the effect of such an error. Is such a defect in the writ fatal as claimed by the defendant or is it only an irregularity which is not fatal per se but curable under O 1A and/or O 2 rr 1 and 2 of the RHC as contended by the plaintiff?

[35] The court has considered the arguments of the plaintiff that the non-compliance is not fatal per se, that it is only an irregularity that is curable. The court has also scrutinised the authorities submitted by the Plaintiff in support of its submissions. In the case of *Pakata Sdn Bhd*, the first defendant had raised two alternative grounds to have the writ set aside, namely that there

was an irregularity as the writ should have been a 12 day writ instead of an eight day writ and secondly, that the name on the writ was wrong, and therefore the wrong person had been sued.

[36] In deciding whether the irregularity could be cured under O 2 r 1(2) of the RHC, His Lordship had followed the views of Bruce LJ in the case of *Metroinvest Anstalt* that the way the court would exercise its powers under O 2 r 1(2):

> is likely to depend on whether it appears that the opposite party has suffered prejudice as a *direct consequence* of the particular irregularity, that is to say the particular failure to comply with the rules. But I would construe O 2 r 1(2) as being so framed to give the court *the widest possible power in order to do justice*. (Emphasis added.)

[37] In the case of *Bank Simpanan Nasional*, His Lordship Low Hop Bing JCA had used the substantial miscarriage of justice test. As stated by His Lordship:

> The issue raised by the defendant herein is highly technical in nature which has not occasioned *a substantial miscarriage of justice* and may be dealt with under O 1A which came into force on 16 May 2002. Order 1A provides that in administering any of the rules herein, the court or a judge shall have regard to the justice of the case and not only to the technical non-compliance with any of the rules herein.
>
> Under O 2 r 3, a court or judge shall not allow any preliminary objection by any party to any cause, matter or proceedings only on the ground of non-compliance with any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[38] The court has carefully perused the two cases relied on by the defendant. The court notes that in the case of *MBT (Malaysia) Sdn Bhd*, the learned judge found that there was 'blatant non-compliance with the very basic and fundamental rules of the court'. The court found that the plaintiff had failed to comply with the mandatory provisions of O 6 r 2(1)(b) and Form 2 of the RHC; that the writ did not state the amount of costs being claimed and had only given the defendant eight days to pay the amount claimed. The learned judge had referred to a circular letter dated 10 April 2000 issued by Tun Dato' Seri Eusoff bin Chin, the former Chief Justice of Malaysia, which directed that 'Writs, summons, affidavits and other documents filed which do not comply with the rules should be rejected'. In that case, there was also an issue about the service of the writ during the court vacation, which service the court had held to be 'invalid, ineffective and void'.

[39] The court has carefully perused the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail* which was heavily relied upon by the defendant but find the

facts in that case to be somewhat different from the facts of our instant case. The facts of the case have been recounted at quite some length as they were very pertinent to the decision that was arrived at. The respondent had filed a writ of summons at the Singapore High Court on 20 September 2000. Simultaneously, he filed two other writ actions *containing almost identical pleadings and cause of action* at the High Court at Shah Alam and Kuala Lumpur. During case management of the Singapore action, the Singapore SAR had stayed the Singapore writ and ordered the Shah Alam writ to be served. By the time that the respondent's appeal against the order was given by the Singapore Court of Appeal, about 16 months had elapsed from the filing of the Shah Alam action. Meanwhile, the respondents applied ex parte and obtained two extensions of the Shah Alam and Kuala Lumpur writs. No attempts were made to serve either writ on the appellant.

[40] The appellant filed two appeals against the orders for the extension of the writs. In that case the questions for determination were whether the requirement of showing such efforts that have been made to effect service of the writ under O 6 r 7(2A) of the RHC is a mandatory prerequisite to the exercise of discretion under O 6 r 7(2) and secondly, in the event of failure to comply with the prerequisite, whether O 1A of the RHC can be invoked to cure that failure.

[41] In the aforestated case, the Federal Court was dealing with the application of O 6 r 7(2A) when it held that that before granting an extension of the writ, the court must be satisfied that serious efforts have been made to serve it. The court went on to hold that a:

> simple and plain statement that efforts had been made to serve cannot be a sufficient ground. The affidavits must provide detailed facts as to when and how attempts to serve were made. Otherwise O 6 r 7 (2A) of the RHC will become a dead letter. The object of the rule will be defeated.

And at p 163 (MLJ); p 345 (CLJ), His Lordship Zaki Tun Azmi CJ held as follow:

> The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A of the RHC cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise parties would be encouraged to ignore the Rules. Thus in this case, O 1A of the RHC does not apply as the respondents had intentionally disregarded O 6 r (2A) for their own reasons.

[42] And for the sake of completeness, the Federal Court also defined 'technical non-compliance' as a non-compliance with a rule which is not fundamental or mandatory in nature.

[43] It is true that the cases cited by learned counsel for the plaintiff are decisions of the High Court whereas the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail* referred to by the defendant is a decision of the Federal Court. However, upon a careful reading of the authorities cited, the court is satisfied that the facts of the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail* can be distinguished. The Federal Court had refused to invoke O 1A because the facts clearly showed that the respondents had intentionally disregarded' O 6 r 7(2A) of the RHC for their own reasons. The filing of three similar actions in the High Court in Singapore, Kuala Lumpur and Shah Alam, the fact that no steps were taken to serve the writ while awaiting the decision of the Singapore Court of Appeal and the filing of ex parte applications for extensions are all facts which speak for itself. It was as a result of the deliberate actions of the respondent, the deliberate acts of non-compliance which caused the Federal Court to decline to invoke O 1A of the RHC.

[44] However, the facts of our instant case do not show a similar act of deliberate non-compliance. According to the plaintiff, the error was a clerical mistake that was made unintentionally. There is no suggestion by the defendant that the citing of only eight days for entering appearance was anything but a mistake. The court notes that learned counsel for the defendant was himself in error when he stated in his written submissions that the time for entering appearance was 12 days although he did subsequently submit that it should be 20 days.

[45] The court is of the view that the correct position to take would be to determine if the defendant had suffered any prejudice as a result of the non-compliance. In this case, the defendant successfully applied for leave to enter conditional appearance although it had failed to apply to set aside the writ within 30 days from the date of the order and had to apply for an extension of time. The court notes the defendant's arguments that the fact that they had managed to retain and instruct counsel within a short space of time should not be taken to mean that they had suffered no prejudice. However, the court is of the view that the more proper approach is to have regard to the justice of the case without dwelling overly on technical non-compliance where such non-compliance has not occasioned a substantial miscarriage of justice.

[46] Taking into consideration all relevant issues, the court finds that *in this case* the non-compliance of the plaintiff in giving the defendant only eight days to enter appearance did not occasion a miscarriage of justice. No adverse order was obtained against the defendant during this eight day period. Had such an

adverse order been obtained, the court would have no hesitation in striking it down. The court finds that the non-compliance is but an irregularity which is curable under O 2 r 3. To rule otherwise and to require the plaintiff to re-file his writ would have meant more delay in resolving the dispute between the parties and run counter to the dictates of O 1A.

[47] A word on the issue of forum non conveniens. On the authority of *Kenichi Hattori & Anor v Minoru Yamashita & Anor* [2003] MLJU 608; [2004] 1 CLJ 491 and *Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd* [2006] 4 MLJ 271; [2006] 2 CLJ 1021 the court is satisfied that the four subparagraphs of s 23(1) of the Courts of Judicature Act 1964 are to be read disjunctively. Whilst the defendant has sought to argue that the action in this case is in respect of the construction of a 12 storey hotel in Kuching and that the 'breach of contract' accrued in Sarawak when the plaintiff failed to remedy the defects to the building, however upon a careful perusal of the statement of claim, the court finds that this is in fact not so. There is absolutely no mention of the construction of a 12 storey hotel or any other building and consequently no issue about any breach of contract. On the contrary, the plaintiff's claim is premised on the dishonoring of a Bank Muamalat Malaysia cheque issued by the defendant when it was presented for payment at the plaintiff's bank in Kuala Lumpur.

[48] Although the High Court at Kuching also has jurisdiction by virtue of the fact that the defendant has its place of business in Sarawak, however that fact does not allow the defendant to apply to strike out the writ for want of jurisdiction.

[49] Accordingly and for the reasons aforestated, encl 13 is dismissed with costs.

[50] In light of the above decision, encl 21 which is the plaintiff's appeal against the decision of the SAR which stayed the plaintiff's application to set aside the ex parte order (encl 11) until the disposal of encl 13 is now academic. Enclosure 13 has now been disposed of. As such, the court makes no order in respect of encl 21.

Defendant's application dismissed with costs.

Reported by Kohila Nesan